

FILED

MAY 03 2012

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

**SECRETARY, BOARD OF
OIL, GAS & MINING**

---oo0oo---

IN THE MATTER OF THE REQUEST
FOR AGENCY ACTION OF GENWAL
RESOURCES, INC., PETITIONER AND
PERMITTEE; DIVISION OF OIL, GAS
AND MINING, RESPONDENT –
REQUEST FOR BOARD REVIEW OF
DIVISION ORDER DO10A, REQUIRING
BONDING FOR THE PERPETUAL
TREATMENT OF MINE WATER
DISCHARGE AT THE CRANDALL
CANYON MINE IN EMERY COUNTY,
UTAH.

:
:
:
:
:
:
:
:

ORDER ON MOTION FOR
REHEARING

Docket No. 2010-026
Cause No. C/015/0032 F

---oo0oo---

The Board issued its Findings of Fact, Conclusions of Law and Order (the “March Order”) in the above-captioned matter on March 6, 2012. On April 5, 2012, Respondent Genwal Resources, Inc. (“Genwal”) filed a Petition for Reconsideration of Water Treatment Bond Structuring (“Petition”). On April 19, 2012, the Division of Oil, Gas and Mining (“Division”) filed a Response to Genwal’s Petition for Reconsideration of Water Treatment Bond Structuring (“Opposition Memorandum”). On April 23, 2012, Genwal filed a Reply Memorandum in Support of Reconsideration (“Reply Brief”).

The Board set the Petition for oral argument at its April 25, 2012 hearing at the Sevier County Administration Building, Commission Chambers, 250 North Main St., Richfield, Utah. The following members of the Board were present at the April 25, 2012 oral argument and voted unanimously on the following ruling: James T. Jensen, Chairman, Ruland J. Gill, Jr., Vice Chairman, Jake Y. Harouny and Kelly L. Payne. Board members Chris D. Hansen and Carl F. Kendell, who have not previously participated as voting Board members in this matter, attended the April 25, 2012 oral argument but did not participate in the vote.

NOW THEREFORE, the Board, having considered the above-listed briefs¹ and the arguments made at the April 25, 2012 hearing, and good cause appearing, hereby denies the Petition and clarifies the March Order as follows.

In its Petition, Genwal notes that the March Order required Genwal to increase its bond by \$720,000 and that this amount was to be held undiminished until elevated iron concentrations had fallen below acceptable levels as discussed in the March Order. Petition at 1. Genwal asks the Board to restructure the bonding requirement to permit a bond increase of \$480,000, with the remaining \$240,000 to be deposited into an account to be replenished annually and applied by Genwal to operating expenses associated with water treatment. *Id.* The Division argues that this restructuring would effectively reduce the amount available to pay for water treatment in the event of a default by the amount used for operating expenses as of the date of the default. Opposition Memorandum at 5. The Board concludes that good cause to modify this requirement of the March Order has not been shown and therefore denies the Petition in this regard.

In its Petition, Genwal argues that the March Order overlooked a necessary administrative step of analyzing whether the existing bond coverage is already adequate to cover reclamation costs (including the costs of water treatment). Reply Brief at 2-3 (citing Utah

¹ The Board did not consider the materials submitted with the Reply Brief in their entirety. Under the Board's rehearing rule, all portions of the petition for rehearing were due by April 10, 2012, and the rule does not provide for the filing of reply briefs. *See* Utah Admin. Code R641-110-100 through 400. Because the Board elected to hear oral argument on the Petition, the Division at the April 25, 2012 hearing waived any objection to the Board considering the legal arguments set forth in the Reply Brief given that those points could have been presented orally at the scheduled argument in any case. For its part, Genwal waived any objection to the Division making certain arguments in its Opposition Memorandum. The Division also stipulated at oral argument to consideration of the late-filed affidavit submitted in connection with the Reply Brief (the affidavit was filed on April 24, 2012). The Board has not considered that affidavit, however, because, lateness aside, it is directed to an excess bond coverage inquiry that the Board has remanded to the Division (see below), and the matters set forth in the affidavit can therefore be considered by the Division at a later date.

Admin. Code R645-301-830.440). Genwal alleges that based upon an internal audit, its existing reclamation bond exceeds the total cost of remaining reclamation by more than \$800,000.

Petition at 3. Genwal asks that the Board, if it rejects Genwal's restructured bond proposal, conduct a hearing on the cost of remaining reclamation and whether there exists excess bond coverage to cover some or all of the \$720,000 bond required by the March Order. Reply Brief at 5.

The Board agrees with Genwal that if excess bond coverage can be demonstrated, the amount of the excess coverage may be left in place and substitute for some or all of the \$720,000 bond required by the March Order. Reading the provisions of Utah Admin Code R645-301-830.400 as a whole, however, the Board does not agree that the analysis of excess bond coverage Genwal has requested must occur prior to the posting of the \$720,000 bond. Section 830.410 empowers the Division to adjust the amount of the bond whenever the cost of future reclamation changes. The Board does not read Section 830.440 to limit that power. In any event, to the extent that Section 830.440 requires the Division to review the existing bond for adequacy under circumstances where the permit is revised, it does not state that the Division as a part of that analysis must consider potential bond reductions or releases Genwal has not applied for, or potential excess bond amounts Genwal has not formally requested that the Division determine. Where, as here, an operator claims to have evidence demonstrating that excess bond coverage exists, Section 830.430 specifies that the operator will apply for a reduction to the bond amount by submitting this evidence to the Division.

In the present case, the Board concludes that the required \$720,000 should be posted by the deadline stated below and any alleged excess bond coverage will be analyzed when Genwal has submitted its evidence to the Division as discussed below. Depending upon the timing of

that analysis, a finding of excess bond coverage may reduce the amount Genwal would have to post to comply with the \$720,000 bonding requirement, or if such amount has already been posted, entitle Genwal to a release of some or all of that amount to the extent the \$720,000 bond requirement is covered by the demonstrated excess bond coverage.

While the Board agrees with Genwal that any demonstrated excess bond coverage may be credited in this way, the Board views the Division as the appropriate party to evaluate the cost of remaining reclamation and to determine what amount of excess bond coverage may exist. As more fully addressed in the bonding regulations, this kind of analysis is to be carried out by the Division when the operator submits evidence and requests a reduction. In response to some confusion on this point at oral argument, the Board clarifies that it did not intend in the March Order to preclude the Division from carrying out administrative actions the Division would otherwise take in connection with the posting and maintenance of the additional bond amount specified in the March Order. Although the Board maintains continuing jurisdiction to revisit findings made in the March Order on issues such as the duration of discharge and the cost of water treatment (such as where a party later comes forward with more recent cost data or water monitoring data indicating that these findings should be reviewed), the Board leaves to the Division any remaining administrative actions associated with implementing the bonding requirement set forth in the March Order.

Based on the foregoing, the Board denies the Petition's request for approval of a restructured bond requiring the posting of a \$480,000 bond and establishment of a \$240,000 operational account. The Board agrees with Genwal's suggestion that any excess bond coverage may be applied toward the \$720,000 bond requirement set forth in the March Order once that excess coverage is demonstrated. The Board clarifies that to the extent that additional

administrative actions are necessary or appropriate in implementing the bonding requirement discussed in the March Order, such as approving the form of bond, making determinations concerning excess bond coverage, etc., this matter is remanded to the Division for such action. To the extent not clarified in this Order, all terms of the March Order remain unchanged. Genwal shall have until July 3, 2012 to comply with the bonding requirements set forth in the March Order.

Notice of Right of Judicial Review by the Supreme Court of the State of Utah. As required by Utah Code Ann. §63G-4-208(1), the Board notifies all parties to this proceeding that they have the right to seek judicial review of this Order and the Board's prior rulings in this matter by filing an appeal with the Supreme Court of the State of Utah within 30 days after the date this Order is entered. Utah Code Ann. §63G-4-401(3)(a) and 403.

Notice of Right to Petition for Reconsideration. As an alternative, but not as a prerequisite to judicial review, the Board notifies all parties to this proceeding that they may apply for reconsideration of this Order. Utah Code Ann. § 63G-4-302, entitled "Agency Review – Reconsideration," states:

- (1) (a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63G-4-301 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.
- (b) Unless otherwise provided by statute, the filing of the request is not a prerequisite for seeking judicial review of the order.
- (2) The request for reconsideration shall be filed with the agency and one copy shall be sent by mail to each party by the person making the request.
- (3)(a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.

(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.

Id.

The Rules of Practice and Procedure before the Board of Oil, Gas and Mining entitled “Rehearing and Modification of Existing Orders” state:

Any person affected by a final order or decision of the Board may file a petition for rehearing. Unless otherwise provided, a petition for rehearing must be filed no later than the 10th day of the month following the date of signing of the final order or decision for which the rehearing is sought. A copy of such petition will be served on each other party to the proceeding no later than the 15th day of that month.

Utah Admin. Code R641–110–100.

See Utah Administrative Code R641-110-200 for the required contents of a petition for rehearing. The Board rules that should there be any conflict between the deadlines provided in the Utah Administrative Procedures Act and the Rules of Practice and Procedure before the Board of Oil, Gas and Mining, the later of the two deadlines shall be available to any party moving to rehear this matter. If the Board later denies a timely petition for rehearing, the aggrieved party may seek judicial review of the Order by perfecting an appeal with the Utah Supreme Court within 30 days thereafter.

The Board retains exclusive and continuing jurisdiction of all matters covered by this Order and the March Order and of all parties affected thereby; and specifically, the Board retains and reserves exclusive and continuing jurisdiction to make further orders as appropriate and authorized by statute and applicable regulations.

The Chairman’s signature on a facsimile copy of this Order shall be deemed the equivalent of a signed original for all purposes.

ISSUED this 3rd day of May, 2012.

Utah Board of Oil, Gas & Mining


James T. Jensen, Chairman

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Order for Docket No. 2010-026,
Cause No. C/015/0032F to be mailed with postage prepaid, this 4th day of May, 2012, to the
following:

Denise Dragoo
James P. Allen
Snell & Wilmer, LLP
15 West South Temple, Suite 1200
Salt Lake City, UT 84101

Kevin N. Anderson
Jason W. Hardin
Fabian & Glendenin
215 South State, Suite 1200
Salt Lake City, UT 84111

Huntington-Cleveland Irrigation Company
Allen Staker, President
P.O. Box 327
Huntington, UT 84528

Steven F. Alder
Fred Donaldson
Assistant Attorneys General
Utah Division of Oil, Gas & Mining
1594 West North Temple, Suite 300
Salt Lake City, UT 84116

